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The Archaeological Resources Protection Act - Twenty Five Years Later

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I. INTRODUCTION

Following the overthrow of Saddam Hussein, there was extensive looting of museums and archaeological sites in Iraq.[1] This conduct was swiftly condemned and in the United States legislation was introduced in both the House and the Senate providing for import restrictions regarding cultural and archaeological materials from Iraq.[2] The looting of archaeological sites is a lucrative and old business.[3] In the United States, one estimate indicates that a third of the approximately 2,000,000 sites located in federally owned lands have been looted.[4] In some parts of the

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1. *See, e.g.*, Micah Garen, *Looting Continues at Archaeological Sites Around Iraq*, BAGHDAD BULLETIN, Jun. 24, 2003, *available at* http:www.baghdadbulletin.com/pageArticle.php?article_id=39&cat_id=25 ("After the recent war, the looting reached a fevered pitch. Important sites such as Isin, Umma, Umma Akrab and Larsa were turned into swiss cheese by teams of looters, reportedly up to 200 to 300 strong at times."); Dan Vergano, *Expedition Verifies Looting of Iraqi Ruins, Museums*, USA TODAY, Jun. 11, 2003 ("Ground surveys of 23 sites revealed serious looting at 14 ancient cities, and a helicopter survey of 13 sites in southern Iraq found serious looting at 10 locations."); Edmund L. Andrews, *On Iraqi Highways, Artifacts for Sale*, INT'L HERALD TRIBUNE, May 29, 2003 ("After American forces first entered Baghdad, looters raided Iraq's major museums and its main library, which is a repository for thousands of cuneiform tablets.")

2. *See Legislating Protection for Iraqi Heritage*, ARCHAEOLOGY, Jun. 27, 2003, *available at* http://www.archaeology.org/magazine.php?page=online/features/iraq/HR2009 (discussing differences between H.R. 2009 ("Iraq Cultural Heritage Protection Act") and S. 1291 ("Emergency Protection for Iraqi Cultural Antiquities Act of 2003")).

3. *See* Glenna J. Sheveland, Note, *Evaluation of the Effectiveness of Cultural Resource Laws in Criminal Prosecution for Theft of Archaeological and Cultural Resources from Federal Lands*, 28 N.E. J. CRIM & CIV. CON. 27, 29 (2002) (noting that in the United States, by the late 1700s and early 1800s, there was a dramatic shift from "attempts to provide scientific understanding of archaeological sites to the outright looting and vandalizing of these sites solely for commercial gain") (footnote omitted); Stephanie A. Ades, Comment, *The Archaeological Resources Protection Act: A New Application in the Private Property Context*, 44 CATH. U. L. REV. 599 (1995) ("Archaeological looting and trafficking is a lucrative and thriving business in the United States with a growing international market for Native American artifacts.") (footnotes omitted).

4. *See* Sheveland, *supra* note 3, at 54. The two million figure may be conservative; some archaeologists estimate the number of sites on Indian and federal lands at six to

country, law enforcement officials maintain that the theft and illegal trafficking of archaeological resources ranks fourth behind drugs, guns and money laundering.[5]

In the late 1970s, the danger to American archaeological resources from looters, particularly in the Southwest, reached significant proportions and, given the deficiencies of existing federal law, led in 1979 to the passage of the Archaeological Resources Protection Act ("ARPA" or the "Act").[6] Now twenty-five years old, ARPA has been one of the principal federal laws used to protect archaeological resources.[7] This Article, which is divided into two parts, examines the few reported decisions which have interpreted some of the key criminal and civil penalty provisions under ARPA, as well as the application of the Sentencing Guidelines to criminal violations under the Act. First, the Article provides an overview of ARPA's criminal and civil penalty provisions. The Article next analyzes how courts have addressed legal challenges to some of those provisions, including the application of the Sentencing Guidelines, thereby providing a summary of the evolving case law regarding the Act in these areas.

II. OVERVIEW

In 1979, Congress passed ARPA to protect archaeological resources and sites[8] found on Indian and public lands[9] and to pro-

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seven million. *See* Monograph, *Trade in Illicit Antiquities: The Destruction of the World's Archaeological Heritage*, Chapter 11 Protecting the Past for the Future: Federal Archaeology in the United States (2001), at 97.

5. Kris Axtman, *Archaeological Looting: U.S. Gets Tougher on Lucrative Crime*, CHRISTIAN SCIENCE MONITOR, Jun. 20, 2002, *available at* http://www.csmonitor.com/2002/0620/p02s02-usju.html.

6. Archaeological Resources Protection Act of 1979, Pub. L. No. 96-95, 93 Stat. 721 (codified as amended at 16 U.S.C. §§ 470aa-mm (2002)). *See* Francis P. McManamon, *Cultural Resources and Protection Under United States Law*, 16 CONN. J. INT'L L. 247, 265 (2001) ("In the 1970s, the threats to American archaeological resources from looting had reached notorious proportions, especially in the Southwest. In response . . . ARPA was . . . enacted . . . when difficulties in enforcing the Antiquities Act, and weaknesses in the penalties provided by that law, became critical.") (footnotes omitted).

7. *See* McManamon, *supra* note 6, at 266 (noting that "[t]he primary impetus behind ARPA was the need to provide more effective law enforcement to protect archaeological sites.") Other statutes commonly used in the prosecution of archaeological related offenses are 18 U.S.C. § 641 (theft) and 18 U.S.C. § 1361 (destruction of government property). *See* Sheveland, *supra* note 3, at 57.

8. While not defined under the Act, it is generally understood that "[a]n archaeological 'site' is an area in which some human activity has occurred in the past. The site is usually defined on the basis of artifacts and features remaining at the location, and resulting from human activity." Norbert L. Bartochowski, Comment, *Takings, Archaeological Sites, and*

mote the study and evaluation of these resources through increased cooperation between governmental authorities, the professional archaeological community, and private individuals.[10] To assist in implementing its provisions, the Act directed the De-

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Artifacts, 8 ALB L. ENVTL. OUTLOOK 134, 135 (2002). An archaeological resource is defined under the statute as:

> any material remains of past human life or activities which are of archaeological interest, as determined under uniform regulations . . . . Such regulations containing such determination shall include, but not be limited to: pottery, basketry, bottles, weapons, weapon projectiles, tools, structures or portions of structures, pit houses, rock paintings, rock carvings, intaglios, graves, human skeletal materials, or any portion or piece of any of the foregoing items. . . . No item shall be treated as an archaeological resource under regulations . . . unless such item is at least 100 years of age.

16 U.S.C. § 470bb(1). Paleontological specimens are excluded "unless found in an archaeological context" which mean the specimens must have been worked on by humans and be at least 100 years old. *Id. See generally* David J. Lazerwitz, Note, *Bones of Contention: The Regulation of Paleontological Resources on the Federal Public Lands*, 69 IND. L. J. 601, 605-06 (1994) (discussing differences between paleontological and archaeological resources). Arrowheads found on the ground also are excepted from the criminal and civil penalty provisions of the Act. 16 U.S.C. §§ 470ee(g), 470ff(a)(3). Lastly, to the extent that rocks, bullets, coins or minerals are not defined as archaeological resources under pertinent agency regulations (*see* footnote 11, *infra*), they are exempt from the provisions of the Act. 16 U.S.C. § 470kk(b). *See generally* Kristine O. Rogers, *Visigoths Revisited: The Prosecution of Archaeological Resource Thieves, Traffickers, and Vandals*, 2 J. ENVTL. L. & LIB. 47, 74 (1987) (noting how the exemptions identified above are illusory since "items will most assuredly be found in a larger archaeological context which cannot legally be disturbed" and furthermore "ample regulations within each individual agency cover items, such as arrowheads, which may appear to have been declared fair game by the passage of ARPA") (footnote omitted).

9. Public lands are those which are administered or owned by the United States as part of the national forest system, the national wildlife refuge system, or the national park system and all lands which the United States holds in fee title (except lands under the jurisdiction of the Smithsonian Institution and lands on the Outer Continental Shelf). 16 U.S.C. § 470bb(3). Indian lands are those of Indian individuals or tribes which either are subject to a restriction against alienation imposed by the United States or which are held in trust by the United States. *Id.* § 470bb(4).

10. 16 U.S.C. § 470aa(b). *See also* 16 U.S.C. §§ 470bb(2), 470dd. ARPA provides that any "archaeological resources which are excavated or removed from public lands . . . remain the property of the United States[.]" 16 U.S.C. § 470cc(b)(3). To the extent that non-archaeological resources are involved, ARPA does not convey any property rights to one who discovers these resources, and if embedded in the soil of public lands, such resources belong to the United States under a well-recognized exception to the common law of finds. *See* United States v. Shivers, 96 F.3d 120, 122-24 (5th Cir. 1996). The impetus for ARPA stemmed from the recognition by Congress that the existing federal law (which included the Antiquities Act of 1906 and the National Historic Preservation Act) did not provide adequate protection to prevent the destruction and loss of sites and archaeological resources on public and Indian lands from the pillage and uncontrolled excavations of these resources and sites. 16 U.S.C. § 480aa(a)(1)-(3). *See* Uri A. Jurist, Comment, *Wild Burros, Fences, and ARPA: Viewing the Archaeological Resources Protection Act as Property Clause Legislation*, 5 PA. J. CONST. L. 109 (2002) (noting that "[t]he Archaeological Resources Protection Act . . . was created to cure 'deficiencies' of the Antiquities Act of 1906"); Ades, *supra*, note 3, at 606 n.63 ("[t]he inherent deficiencies of the Antiquities Act and the failure of the subsequent federal preservation laws to address the problem of archaeological looting dictated the need for new archaeological resource protection legislation").

partments of the Interior, Defense, and Agriculture and the Tennessee Valley Authority to issue uniform regulations which were subsequently adopted in 1984.[11] Federal land managers also have the authority to promulgate regulations and rules consistent with the governing uniform regulations and which are necessary to perform their responsibilities under the Act.[12]

Upon conviction, ARPA subjects a criminal defendant to a possible criminal fine, imprisonment, and an order of restitution,[13] as well as forfeiture of the archaeological resources, equipment and vehicles connected to the violation.[14] Four types of conduct are

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11. 16 U.S.C. § 470ii(a); *see* 43 C.F.R. §§ 7.1-7.37 (2002) (Department of the Interior); 36 C.F.R. §§ 296.1-296.21 (2002) (Department of Agriculture); 32 C.F.R. §§ 229.1-229.21 (2002) (Department of Defense); 18 C.F.R. §§ 1312.1-1312.21 (2003) (Tennessee Valley Authority). *See* Sherry Hutt, *The Civil Prosecution Process of the Archaeological Resources Protection Act*, Technical Brief 16 *available at* http://www.cr.nps.gov/aad/PUBS/TECHBR/tch16a.htm (noting that "[a]lthough ARPA became law on October 31, 1979, the Uniform Regulations were not adopted until January 6, 1984").

12. 16 U.S.C. § 470ii(b). The "Federal land manager," in the case of public lands, is "the Secretary of the department, or the head of any other agency or instrumentality of the United States, having primary management authority over such lands." *Id.* § 470bb(2). When no agency, instrumentality or department has primary management authority over public or Indian lands, then the federal land manager is the Secretary of the Interior. *Id.* Also, with the Secretary of the Interior's consent, the heads of any instrumentalities or agencies or Secretaries of other departments may delegate their responsibilities under the Act (in whole or in part) to the Secretary of the Interior. *Id.*

13. A federal court has no "inherent power to order restitution." United States v. Snider, 957 F.2d 703, 706 (9th Cir. 1997). Authority for such an order is derived from statute. United States v. Gottesman, 122 F.3d 150, 151 (2d Cir. 1997). ARPA's criminal provisions do not explicitly provide for restitution; they mention cost of restoration and repair in the context of one of the values to be considered in assessing the amount of damage to the resource which will determine whether the conduct involves a misdemeanor or a felony offense. *See* 16 U.S.C. § 470ee(d). The Victim and Witness Protection Act (18 U.S.C. §§ 3663, 3664) grants a district court discretion to order restitution in the case of certain specified offenses. While offenses under ARPA are not specifically identified under that act, it grants a district court discretion to "order restitution in *any* criminal case to the extent agreed to by the parties in a plea agreement." 18 U.S.C. § 3663(a)(3) (emphasis added). Thus, in the case of a *plea* involving only an ARPA violation, a court may order restitution to the extent that it is agreed to by the parties. If, following a trial, a defendant is convicted of an ARPA violation *and* a Title 18 offense (not subject to mandatory restitution under the Mandatory Restitution Act), restitution is discretionary. *See* 18 U.S.C. § 3663(a)(1)(A). Title 18 offenses involving property are subject to mandatory restitution under the Mandatory Restitution Act (18 U.S.C. § 3663A). An illustration of mandatory restitution, in the context of a defendant who was convicted of conspiring to violate ARPA under 18 U.S.C. § 371 and also violating ARPA is found at United States v. Quarrell, 310 F.3d 664, 676-78 (10th Cir. 2002). This case is discussed *infra* Part III.D.

14. 16 U.S.C. §§ 470ee(d), 470gg(b); 18 U.S.C. § 3663; *see* Sherry Hutt, Elwood W. Jones & Martin E. McAllister, *Archaeological Resource Protection* (Preservation Press 1992), at 43 ("Upon conviction in a criminal case a defendant may be incarcerated, fined, required to pay restitution, or any combination of the three.").

proscribed under the Act.[15] First, the Act prohibits the excavation, removal, damage, alteration or attempt to do the same -- without a permit[16] -- of any archaeological resources located on Indian or public lands.[17] Addressing trafficking,[18] the Act next prohibits the sale, purchase, exchange, transportation or receipt (or the offer to do the same), of any archaeological resource which was excavated or removed from Indian or public lands without a permit or otherwise in violation of federal law.[19] ARPA also prohibits the sale, purchase, exchange, transportation, receipt (or offer to do the same), in foreign or interstate commerce, of any archaeological resource which was removed, excavated, exchanged, sold, purchased, received or transported in violation of State or local law.[20] Lastly, counseling, soliciting, or employing any person to violate any of the aforementioned prohibitions is also a violation under the Act.[21]

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15. These prohibitions apply to conduct occurring after October 30, 1979. 16 U.S.C. § 470ee(e).

16. The types of permits and the nature of the exemption to the permit requirement in the case of an Indian tribe or member when the archaeological site is located on Indian lands are discussed in 16 U.S.C. § 470cc. *See* 43 C.F.R. §§ 7.5-7.12; 36 C.F.R. §§ 296.5-296.12; 32 C.F.R. §§ 229.5-229.12; 18 C.F.R. §§ 1312.5-1312.12; David G. Bercaw, Comment, *Requiem for Indiana Jones: Federal Law, Native Americans, and the Treasure Hunters*, 30 TULSA L. J. 213, 220 (1994) (discussing permit system). *See also* Bonnichsen v. United States, 217 F. Supp. 2d 1116, 1165-66 (D. Or. 2002) (discussing curation requirements for resources after removal pursuant to a duly issued permit). The denial of a permit is subject to review under the Administrative Procedure Act. *See* Exhumation of Lewis, 999 F. Supp. 1066, 1069 n.8 (M.D. Tenn. 1998).

17. 16 U.S.C. § 470ee(a).

18. *See* Rogers, *supra* note 8, at 72 (noting that "ARPA is the first federal antiquities preservation law to focus on entrepreneurs").

19. 16 U.S.C. §§ 470ee(b), (f). A museum, for example, "could become liable under the [A]ct for receiving and/or purchasing historical objects taken from public or Indian lands." Marilyn Phelan, *A Synopsis of the Laws Protecting Our Cultural Heritage*, 28 NEW. ENG. L. REV. 63, 75 (1993); *see* Lorrie D. Northey, *The Archaeological Resources Protection Act of 1979: Protecting Prehistory for the Future,* 6 HARV. ENVTL. L. REV. 61, 80 (1982) ("Museums, universities, and other institutions, which are subject to ARPA's prohibitions, must now take care to determine the origin of their acquisitions.") (footnote omitted). *See also* Hutt, Jones & McAllister, *supra* note 14, at 35 (noting that "exchange of an item does not require that money change hands").

20. 16 U.S.C. § 470ee(c); *see* Jurist, *supra* note 10, at 120 (noting that this section "extends ARPA protection to archaeological resources that are not derived from public or Indian lands once these objects are obtained in violation of any state or local law and are transported in interstate or foreign commerce.") (footnote omitted); Northey, *supra* note 19 at 80 ("Violators of state or local law are now subject to stiff federal criminal penalties when they traffic in illegally obtained artifacts and are more likely to be prosecuted because enforcement does not depend entirely on the efforts of state and local governments with limited jurisdictions and inadequate enforcement resources.") (footnote omitted).

21. 16 U.S.C. § 470ee(d); *see* Hutt, Jones & McAllister, *supra* note 14, at 42 (recognizing that "[t]he fourth ARPA prohibition category is aimed at those who hire others who then have direct contact with the illegally acquired archaeological material").

For criminal liability to attach, any of these offenses must be undertaken "knowingly."[22] The maximum penalty under ARPA, in the case of a first violation is a $10,000 fine and one years' imprisonment unless the commercial or archaeological value of the archaeological resource involved and the cost of repair and restoration exceeds $500, in which case the maximum penalty is a $20,000 fine and two years' imprisonment.[23] The maximum penalty for a second offense is a $100,000 fine and five years' imprisonment.[24] Under the Criminal Fines and Improvement Act of 1987, the maximum fines were increased to $100,000 and $250,000 in the case of an individual, and $200,000 and $500,000 in the case of a corporation, for (certain) misdemeanor and felony

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22. 16 U.S.C. § 470ee(d); *see* Hutt, Jones & McAllister, *supra* note 14, at 43 ("A violation of ARPA is a general intent crime. . . . A general intent offense only requires the government to show that the persons were acting of their own free will, but not that they knew in their minds that it was wrong to proceed."). *But see* pages 232-235, infra.

23. *Id.* § 470ee(d). In 1988, the amount necessary to trigger a felony violation was decreased from $5,000 to $500. *See* P.L. 100-588 (Sec.(b)), 102 Stat. 2983 (1988). *See also* Northey, *supra* note 19, at 83 (noting that in ascertaining whether the violation reaches the felony threshold, the three elements of value to consider are "(1) commercial or archaeological value, (2) cost of restoration, and (3) cost of repair.") (footnotes omitted). *See generally* Sherry Hutt, *Illegal Trafficking in Native American Human Remains and Cultural Items: A New Protection Tool*, 24 ARIZ. ST. L. J. 135, 141 (1992) ("It was only subsequent to November 1998, when the jurisdictional limit for a felony was reduced from $5,000 to $500 in damages, that ARPA became a widely used law."). The Department of the Interior regulations (which are identical to those issued by the Departments of Agriculture and Defense and the Tennessee Valley Authority) define archaeological value, commercial value and cost of repair as follows:

> (a) *Archaeological Value* . . . [T]he archaeological value of any archaeological resource involved in a violation of the prohibitions in Section 7.4 . . . shall be the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential. . . .
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> (b) *Commercial value* . . . [T]he commercial value of any archaeological resource involved in a violation of the prohibitions of Section 7.4 . . . shall be its fair market value. Where the violation has resulted in damage to the archaeological resource, the fair market value should be determined using the condition of the archaeological resource prior to the violation, to the extent that its prior condition can be ascertained.
>
> (c) *Cost of restoration and repair* . . . [T]he cost of restoration and repair of archaeological resources damaged as a result of a violation of prohibitions or conditions . . . shall be the sum of the costs already incurred for emergency and restoration or repair work, plus those costs projected to be necessary to complete restoration and repair.

43 C.F.R. § 7.14(a)-(c). *See* 36 C.F.R. § 296.14; 32 C.F.R. § 229.14; 18 C.F.R. § 1312.14. *See also* Hutt, Jones & McAllister, *supra* note 19, at 65-68 (discussing methodology to arrive at each of these values).

24. 16 U.S.C. § 470ee(d). Restitution may also be ordered under certain circumstances. *See supra* footnote 13.

offenses, respectively.[25] All archaeological resources connected to any of the three criminally proscribed acts under ARPA, and all equipment and vehicles used in connection with any of those violations are, upon conviction, subject to forfeiture to the United States.[26]

ARPA also provides for the imposition of civil penalties by the federal land manager for violations of the governing regulations or any condition or term in a duly issued permit.[27] The administrative mechanics of the civil penalty provisions are straightforward. Prior to the imposition of a penalty, the putative violator must be served with a notice of violation advising him of the specific nature of the infraction, the facts surrounding it, the amount of the proposed penalty (if one has been ascertained by the time the notice is served), and the right to respond in writing to the notice by filing a petition for relief.[28] The putative violator must further be informed that he has the right to await receipt of a notice of assessment, request a hearing in connection with such notice, and seek judicial review of any administrative decision imposing a civil penalty.[29] He then has 45 days to respond to the notice of violation (or proposed penalty, if served later), during which time he may enter into informal discussions with the land manager, file a petition for relief, take no action and await a notice of assessment, or accept the proposed penalty.[30]

Upon expiration of the period for filing a petition for relief, the completion of review of any petition filed, or the conclusion of the informal discussions, whichever takes place later, if the federal land manager determines that a violation occurred, he must notify the putative violator in writing of the amount assessed explaining

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25. P.L. 100-185, 101 Stat. 1279 (codified at 18 U.S.C. § 3571).

26. 16 U.S.C. § 470gg(b)(1).

27. 16 U.S.C. § 470ff(a). The regulations incorporate the provisions found in sections 470ee(a) and (b) of ARPA. 18 C.F.R. § 7.15(a); 32 C.F.R. § 229.15(a); 36 C.F.R. § 296.15(a); 43 C.F.R. § 7.15(a). On the question of what impact, if any, the provision of these civil penalties have on the ability of federal land managers to initiate civil actions, one commentator has noted that "[t]he Act's legislative history suggests . . . that Congress was aware that federal land managers had authority to initiate civil actions to recover damages, and did not intend to restrict this or any other available remedy." Northey, *supra* note 19, at 87 n.182.

28. 18 C.F.R. § 296.15(b)(1)-(4); 32 C.F.R. § 229.15(b)(1)-(4); 36 C.F.R. § 296.15(b)(1)-(4); 43 C.F.R. § 7.15(b)(1)-(4); *see* 16 U.S.C. § 470ff(a)(1) ("No penalty may be assessed under this subsection unless such a person is given notice and opportunity for a hearing with respect to such violation.")

29. *Id.*

30. 18 C.F.R. § 296.15(c)(1)-(4); 32 C.F.R. § 229.15(c)(1)-(4); 36 C.F.R. § 296.15(c)(1)-(4); 43 C.F.R. § 7.15(c)(1)-(4).

how that figure was reached.[31] The putative violator served with a notice of assessment may request a hearing within 45 days of service of the notice of assessment.[32] The decision resulting from this hearing or any further applicable administrative appeal constitutes the final agency decision, which may be appealed to a United States District Court.[33] If the putative violator does not appeal and does not pay the assessed civil penalty within 45 days of the final administrative decision, the federal land manager may request the Attorney General to institute a civil action to collect the penalty, or initiate an action directly.[34] In either case, neither the amount nor the validity of the penalty assessed is subject to judicial review.[35]

In general, in the case of a first violation, the maximum amount of the penalty is limited to the cost restoration and repair plus the commercial or archaeological value of archaeological resources not recovered or destroyed.[36] In the case of a second violation, those amounts are doubled.[37] When assessing a penalty, the federal land manager may determine to impose an amount less than the maximum, or may offer to remit or mitigate a penalty based on a number of factors including the aggrieved party's agreement to return the archaeological resource(s), hardship, and whether the

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31. 18 C.F.R. § 296.15(e)(4), (f); 32 C.F.R. § 229.15(e)(4), (f); 36 C.F.R. § 296.15(e)(4), (f); 43 C.F.R. § 7.15(e)(4), (f). The notice of assessment must also advise the person served of the right to an administrative hearing and the right to judicial review of any final administrative ruling which imposes a civil penalty. 18 C.F.R. § 296.15(f)(3); 32 C.F.R. § 229.15(f)(3); 36 C.F.R. § 296.15(f)(3); 43 C.F.R. § 7.15(f)(3).

32. 18 C.F.R. § 296.16(g)(1)-(2); 32 C.F.R. § 229.16(g)(1)-(2); 36 C.F.R. § 296.16(g)(1)-(2); 43 C.F.R. § 7.16(g)(1)-(2). At this hearing, the amount of the assessment may be increased or decreased by the administrative law judge. 18 C.F.R. § 296.15(g)(3); 32 C.F.R. § 229.15(g)(3); 36 C.F.R. § 296.15(g)(3); 43 C.F.R. § 7.15(g)(3).

33. 18 C.F.R. § 296.16(h)(3), (i); 32 C.F.R. § 229.16(h)(3), (i); 36 C.F.R. § 296.16(h)(3), (i); 43 C.F.R. § 7.16(h)(3), (i); *see* 16 U.S.C. § 470ff(b)(1).

34. 18 C.F.R. § 296.16(i)(1)-(2); 32 C.F.R. § 229.16(i)(1)-(2); 36 C.F.R. § 296.16(i)(1)-(2); 43 C.F.R. § 7.16(i)(1)-(2); *see* 16 U.S.C. § 470ff(b)(2).

35. 16 U.S.C. § 470ff(b).

36. 18 C.F.R. § 296.16(a)(1); 32 C.F.R. § 229.16(a)(1); 36 C.F.R. § 296.16(a)(1); 43 C.F.R. § 7.16(a)(1); *see* 16 U.S.C. § 470ff(a)(2). As to the reference in section 470ff(a)(2) that in assessing the amount of the penalty the regulations should take into account, among "other factors," the commercial or archaeological value of the archaeological resource involved, as well as the cost of repair and restoration of the resource, one commentator has noted that given the Congressional intent to limit the amount of the civil penalty by the commercial or archaeological value of the resource and the cost of repair or restoration, "'other factors' may refer to mitigating factors." Northey, *supra* note 19, at 86 n.168.

37. 18 C.F.R. § 296.16(a)(2); 32 C.F.R. § 229.16(a)(2); 36 C.F.R. § 296.16(a)(2); 43 C.F.R. § 7.16(a)(2). No penalty imposed under section 470ff(a)(2) may "exceed an amount equal to double the cost of restoration and repair of resources and archaeological sites damaged and double the fair market value of resources destroyed or not recovered." 16 U.S.C. § 470ff(a)(2).

person willfully committed the violation.[38] Lastly, as with criminal sanctions, the forfeiture provisions may be triggered if a civil penalty is assessed or there is "a determination by any court that such archaeological resources, vehicles, or equipment were involved in such violation."[39]

III. EVOLVING CASE LAW RELATING TO CRIMINAL PENALTY PROVISIONS

In recent years, ARPA's criminal penalty provisions have come under judicial scrutiny. The principal challenges have centered on whether the statute is constitutionally overbroad and vague, the application of the mens rea requirement, and whether the prohibition against interstate or foreign commerce involving archaeological resources is limited to objects removed from federal or Indian lands. Cases addressing these issues, as well as the appli-

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38. 18 C.F.R. § 296.16(b); 32 C.F.R. § 229.16(b); 36 C.F.R. § 296.16(b); 43 C.F.R. § 7.16(b). Specifically, the regulations provide:

> (1) Determination of the penalty amount and/or a proposal to mitigate or remit the penalty may be based upon any of the following factors:
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> (i) Agreement by the person being assessed a civil penalty to return to the Federal Land manager archaeological resources removed from public lands or Indian lands;
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> (ii) Agreement by the person being assessed a civil penalty to assist the Federal land manager in activity to preserve, restore, or otherwise contribute to the protection and study of archaeological resources on public lands or Indian lands;
>
> (iii) Agreement by the person being assessed a civil penalty to provide information which will assist in the detection, prevention, or prosecution of violations of the Act or this part;
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> (iv) Demonstration of hardship or inability to pay, provided that this factor shall only be considered when the person being assessed a civil penalty has not been found to have previously violated the regulation in this part;
>
> (v) Determination that the person being assessed a civil penalty did not willfully commit the violation;
>
> (vi) Determination that the proposed penalty would constitute excessive punishment under the circumstances;
>
> (vii) Determination of other mitigating circumstances appropriate to consideration in reaching a fair and expeditious assessment.

Id. When the violation occurs on Indian lands or affects Indian tribal cultural or religious sites, the federal land manager must confer with the appropriate Indian tribe(s) prior to any remission or mitigation of a penalty. 18 C.F.R. § 296.16(b)(2)-(3); 32 C.F.R. § 229.16(b)(2)-(3); 36 C.F.R. § 296.16(b)(2)-(3); 43 C.F.R. § 7.16(b)(2)-(3).

39. 16 U.S.C. § 470gg(b)(3); *see* Rogers, *supra* note 8, at 79 (noting that "[t]his last determination may be made by an administrative law judge at the agency level, and is a powerful plea-bargaining tool for the prosecution.") (footnote omitted); Hutt, *supra* note 11 (noting that administrative law judge "may order that archaeological resources in the possession of the person and all vehicles and equipment which were used in the violation be forfeited") (footnote omitted).

cation of the Sentencing Guidelines and restitution in an ARPA-related prosecution, are analyzed below.

A. *Overbreadth and Vagueness*

Not surprisingly, the first major challenge to ARPA's criminal penalty provisions came in the form of a constitutional attack on the language of the statute.[40] Specifically, in *United States v. Austin*,[41] following a bench trial, defendant was convicted of violating section 470ee(a) of ARPA for excavating archaeological resources (in particular scrapers and arrow points) in an archaeological site without a permit.[42] Maintaining, under the First Amendment, that "curiosity motivated him, [that] his activity was academic, and that academic freedom" protected his conduct, defendant appealed his conviction on the grounds that the statute was unconstitutionally overbroad and vague.[43] The United States Court of Appeals for the Ninth Circuit rejected these arguments.

First, the court ruled that in order to prevail on a claim of overbreadth involving conduct and not merely speech, Austin was required to contend that ARPA "ambiguously reache[d] protected activities and that the overbreadth [wa]s substantial," and he did neither.[44] Insofar as the vagueness challenge was concerned, the court noted that a statute that did not implicate constitutionally protected conduct should not be invalidated unless it was impermissibly vague in all applications.[45] In *Austin*'s case, although defendant argued that the terms "weapons" and "tools" found in the definition of archaeological resource were inherently and impermissibly vague,[46] as to him, "there c[ould] be no doubt nor

40. A similar attack had nullified the criminal penalty provisions of the Antiquities Act. In United States v. Diaz, 499 F.2d 113 (9th Cir. 1974), the court had ruled that 16 U.S.C. § 433, which imposed criminal sanctions for taking "objects of antiquity," was unconstitutionally vague since those terms did not provide adequate notice of what objects were protected under the statute. *Id.* at 114-15.

41. 902 F.2d 743 (9th Cir.), *cert. denied*, 498 U.S. 874 (1990).

42. *Id.* at 744-45. The investigation which led to the charges resulted in the seizure of excavation tools, documents, photographs and approximately 2,800 Native American artifacts. *Id.* at 743.

43. *Id.* at 744-45.

44. *Id.* As the court explained, "[n]ot only d[id] [defendant] not claim that the First Amendment actually protects any activity that ARPA reaches, he d[id] not even suggest its relevance to any activity except his own excavating." *Id.* at 745.

45. *Id.*

46. 16 U.S.C. § 470bb(a)(1); *see Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.").

lack of fair notice that the scrapers and arrow points for which he was convicted [we]re indeed weapons and tools;" consequently, his vagueness challenge failed.[47] ARPA's ability to withstand constitutional scrutiny has been hailed as a "great success for the Act."[48]

B. Mens Rea

As noted previously, for criminal liability to attach under any of ARPA's prohibitions, there must be a finding that the defendant acted "knowingly."[49] But knowingly as to what? With respect to prosecutions under section 470ee(a), one court has ruled that the government must prove that a defendant knew that what he removed, damaged, excavated or otherwise defaced was an "archaeological resource," while another held that the government need not prove that he also knew that the prohibited conduct he engaged in occurred "on public lands." In arriving at these rulings, the courts have applied the teaching of two United States Supreme Court cases addressing the mens rea requirement in other criminal statutes. Each of these cases is briefly discussed below.

First, in *Staples v. United States*,[50] the Supreme Court ruled that in order to convict a defendant of possession of an unregistered firearm under 26 U.S.C. § 5861(d),[51] the government needed to prove that defendant knew that the weapon he possessed had the specific characteristics that brought it within the statutory definition of the National Firearms Act.[52] In that case, the Court concluded that dispensing with a mens rea requirement would "criminalize a broad range of apparently innocent conduct."[53] This was so since "guns generally can be owned in perfect innocence"

47. *Austin*, 902 F.2d at 745.

48. Sheveland, *supra* note 3, at 39 ("The fact that ARPA withstood constitutional scrutiny in the Ninth Circuit was a great success for the Act.") *See also* Jurist, *supra* note 10, at 120 (by explicitly defining "public lands," "Indian lands," and archaeological resources" ARPA's drafters "endeavored[d] to ensure that the same void-for-vagueness fate of the Antiquities Act did not befall ARPA.") (footnote omitted).

49. 16 U.S.C. § 470ee(d).

50. 511 U.S. 600 (1994).

51. 26 U.S.C. § 5861(d) states in relevant part that it is "unlawful for any person . . . to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record[.]"

52. *Staples*, 511 U.S. at 619.

53. *Id.* at 610 (internal quotations omitted).

and "there [wa]s a long tradition of widespread lawful gun ownership by private individuals in this country."[54]

The second case relied on by the lower courts is *United States v. X-Citement Video, Inc.*,[55] where the Supreme Court interpreted section 2252(a) of the Protection of Children Against Sexual Exploitation Act.[56] Section 2252(a) of that act prohibited the knowing transportation, shipment, receipt, or distribution of any visual depiction if such "visual depiction involve[d] the use of a minor engaging in sexually explicit conduct," and the Court ruled that to sustain a conviction under this section, the government needed to prove that the defendant must have known that one of the performers was a minor.[57] The Court was concerned that dispensing with the mens rea requirement would criminalize "otherwise innocent conduct,"[58] and citing the First Amendment, stated that "the age of the performers [wa]s the crucial element separating legal innocence from wrongful conduct."[59] We now turn to the cases discussing mens rea under ARPA.

1. *Archaeological Resources*

In *United States v. Lynch*,[60] defendant was convicted of a felony under section 470ee(a) of ARPA following a conditional plea.[61] The facts in the case were not in dispute. In the summer of 1997, Lynch (a 23-year-old high school graduate) and two friends went deer hunting on Heceta Island, an uninhabited island in southeast Alaska.[62] While his friends were packing up camp, Lynch went looking for caves and as he was walking over some boulders, he noticed what appeared to be the back of a skull.[63] Lynch picked up

54. *Id.* at 610-11. The Court also recognized that the potentially harsh penalty under section 5861(d) – up to 10 years' imprisonment – served as "a further factor tending to suggest that Congress did not intend to eliminate a mens rea requirement." *Id.* at 618-19.

55. 513 U.S. 62 (1994).

56. *Id.* at 65-66.

57. *Id.* at 78.

58. *Id.* at 72.

59. *Id.* at 73.

60. 233 F.3d 1139 (9th Cir. 2000).

61. *Id.* Section 470ee(a) prohibits the excavation, removal, damage, alteration or attempt to do the same, without a permit, of any archaeological resources located on Indian or public lands. 16 U.S.C. § 470ee(a).

62. *Lynch*, 233 F.3d at 1140. A report prepared for the Alaska Native Claims Settlement Act indicated that the remains of an Alaska native village were located on that island. *Id.* There was no evidence that Lynch was aware of that report. *Id.*

63. *Id.*

the object and recognized it as a skull.[64] He then cleared away some rocks and dirt and discovered other bones.[65] After putting these other bones back in place, Lynch took the skull home with him "to do some research on it."[66]

Lynch's discovery came to the attention of U.S. Forest Service agents who interviewed him.[67] Lynch gave the skull to the agents and directed them to the location of the other bones.[68] After the regional Forest Service's archaeologist and a physical anthropolologist were unable to ascertain the age of the skull by osteological examination, a fragment was cut and subjected to carbon dating.[69] The analysis indicated that the skull was at least 1400 years old and Lynch thereafter was charged and convicted of a felony violation under section 470ee(a).[70]

On appeal, Lynch argued that his conviction could not stand because the government had not established that he knew or had reason to know that what he removed was an "archaeological resource."[71] The United Court of Appeals for the Ninth Circuit agreed, vacating the conviction and allowing Lynch to withdraw his plea.[72]

After reviewing the legislative history and the concern expressed there over prosecution "of the casual visitor who happens to find some exposed artifact,"[73] the court pointed out that in most cases, the knowing requirement necessary to trigger a violation meant that a defendant "must 'know the facts that make his conduct illegal.'"[74] In the circumstances involving Lynch, and relying

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64. *Id.*

65. *Id.*

66. *Id.* (internal quotations omitted).

67. *Lynch*, 233 F.3d at 1140. During the interview, Lynch acknowledged that the skull "definitely had been there for a while." *Id.* (internal quotation omitted). He further stated: "Oh man, it's definitely old. There's not a stitch of clothin' or nothin' with it." *Id.* (internal quotation omitted).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1140-41.

72. *Lynch*, 233 F.3d at 1145-46.

73. *Id.* at 1142 (internal quotation omitted); *id.* at 1144 ("comments [of bill's sponsor and others] acknowledge the possibility that boy scouts and other 'casual visitors' might innocently and inadvertently remove an artifact from the public domain."); *id.* at 1145 ("With respect to . . . ARPA . . . the legislative history suggests that Congress was concerned about the risk of penalizing arch[a]ecologically naive visitors to public lands.").

74. *Id.* at 1143 (quoting *Staples*, 511 U.S. at 606). Thus, for example, in Morissette v. United States, 342 U.S. 246 (1952), the Court ruled that under 18 U.S.C. § 641, which criminalized the knowing conversion of "a thing of value of the United States," the govern-

on *Staples*, the court reasoned that there was the very real potential for the imposition of a harsh penalty on an unwitting violator since "a skull may or may not be an archaeological resource, just as it may, or may not be evidence of a recent accident or of a recent crime."[75] Thus, while Lynch "may or may not have been a wholly innocent casual visitor,"[76] the danger of convicting an unwitting person of a felony was present in his case since "nobody knew until after a lengthy investigation that the object taken was more than 100 years old, and that the costs associated with restoration of the site would exceed $500."[77] Recognizing by analogy the widespread tradition of gun ownership identified in *Staples*, the court noted that Lynch's prosecution had to be considered in the context of a "widespread tradition of arrowhead and artifact collecting."[78]

Further, and echoing the concerns of *X-Citement Video* that there should be a presumption that scienter must be proven as to each element in a statute that criminalizes otherwise innocent conduct, the court noted that "[b]ecause removing objects that are not 'archaeological resources' from public land is not a violation of ARPA, the knowingly requirement should apply to the term 'archaeological resources' as well as the prohibited act of removing."[79] In light of these circumstances, the court ruled that in order to sustain a conviction under section 470ee(a), the government needed to establish beyond a reasonable doubt that the defendant knew or had reason to know that he was removing an "archaeological resource."[80]

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ment had to establish that defendant knew that the property he converted belonged to the United States. *Id.* at 271.

75. *Lynch*, 233 F.3d at 1143.

76. *Id.* In this regard, the court observed that Lynch admitted he was "at least curious about, artifacts associated with early inhabitants of the land. He admitted that he was hoping to find something in his cave wonderings, and that he liked to collect things. He even admitted to agents that he knew he had done something wrong." *Id.*

77. *Id.*

78. *Id.* The court rejected the government's characterization of Lynch's conduct as falling within the purview of grave robbing since there was nothing in the record to suggest that Lynch knew or should have known that the skull was located in a grave and he had not been charged with robbing a grave. *Id.* at 1143-44.

79. *Id.* at 1144.

80. *Lynch*, 233 F.3d at 1145-46. The court in *Lynch* made no reference to its prior ruling in *United States v. Tidwell*, 191 F.3d 976 (9th Cir. 1999). In *Tidwell*, defendant was convicted of conspiracy, illegal trafficking in Native American items under the Native American Graves Protection and Repatriation Act (NAGPRA), theft of tribal property, and trafficking in archaeological resources under ARPA. *Id.* The ARPA count related to a set of priest robes from the Acoma Pueblo which defendant purchased from an undercover agent. *Id.* at 979.

2. *Public Lands / Mistake of Fact Defense*

Whether the government must also establish beyond a reasonable doubt that the defendant knew that the prohibited conduct engaged in under section 470ee(a) occurred on public or Indian lands also has been the source of judicial review.[81] In *United States v. Quarrell*,[82] defendants were convicted of violating section 470ee(a) and conspiring to violate ARPA pursuant to 18 U.S.C. § 371 for vandalizing an archaeological site in the Gila National Forest in southern New Mexico.[83] On appeal, they argued that their convictions should be vacated because the government had failed to prove that they knew they were on public lands at the time of the prohibited conduct.[84]

The court rejected this contention, finding that the extension of the "mens rea requirement to the 'located on public lands element' would frustrate the purpose of the Act."[85] The court reasoned that unless the government posted signs at or near an archaeological site, it would be difficult to establish that a defendant knew he was on public lands; yet placing signs near the sites would have the adverse effect of drawing the attention of potential looters.[86] The court also distinguished *Staples* and *X-Citement Video* because "[u]nlike a citizen owning a firearm unaware of its auto-

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In sustaining defendant's challenge to the sufficiency of the evidence in connection with his conviction under section 470ee(b), the court noted that to convict a defendant of a violation under that section the government had to prove that he "(1) purchased or sold, (2) an archaeological resource, (3) that was removed from Indian lands, (4) without a permit." *Id.* at 981-82. In that regard, the expert testimony presented by the government and other evidence that the robes were owned by the Acoma Pueblo were sufficient to uphold the conviction. *Id.* at 981-82. The defendant in *Tidwell* did not argue that the government had to prove that he knew or had reason to know that the artifacts he was trafficking in were archaeological resources and the court noted that (in relation to his conviction under NAGPRA) witnesses had told defendant that they were prohibited from selling the robes. *Id.* at 981.

81. 16 U.S.C. § 470ee(b) similarly makes reference to both public and Indian lands.

82. 310 F.3d 664 (10th Cir. 2002).

83. *Id.* at 668. Defendants were apprehended while excavating a Mimbres-Mogollon ruin. *Id.* at 669. At the time of their arrest, they had in their possession backpacks, sleeping bags, shovels, a gun, an instrument used to gauge the alignment of rock walls, and pieces of Mimbre pottery. *Id.* They "stipulated that they were familiar with Mimbres archaeology and art; they knew they were digging in a prehistoric Mimbres Pueblo; they intended to excavate and remove Mimbres artifacts; and they had not received or applied for a permit from the Forest Service to excavate the site." *Id.*

84. *Id.* at 669.

85. *Id.* at 671.

86. *Id.* In this regard, the court observed that land managers had been authorized by Congress to conceal the location and nature of any archaeological resource unless the disclosure of such resource "would 'not create a risk of harm to such resources or to the site at which such resources [we]re located.'" *Id.* (quoting 16 U.S.C. § 470hh(a)(2)).

matic firing capabilities, or a distributor of sexually-explicit materials unaware of the age of its performers, a person excavating on someone else's land, whether public or private, c[ould] not reasonably expect to be free from regulation."[87] And contrasting the casual visitor intended to be protected by *Lynch's* ruling, the court found that defendants "knew they were excavating and knew they were removing valuable archaeological resources from the land" and that "precisely [wa]s the activity Congress intended to prevent and punish when it enacted ARPA."[88]

In conclusion, the court ruled that the location of defendants' potentially illegal conduct was a jurisdictional element of the offense.[89] As a defense to a prosecution under section 470ee(a), however, the court recognized that a defendant could present a mistake of fact defense by adducing evidence that "honestly and conscientiously," he held a "reasonable belief that he was excavating on private land *with permission*."[90]

C. *Trafficking in Interstate and Foreign Commerce*

Sections 470ee(a) and (b) of ARPA proscribe the unauthorized excavation, removal, damage, alteration or defacement of archaeological resources or the trafficking in any such resources located on public or Indian lands.[91] Section 470ee(c), however, prohibits the trafficking in interstate or foreign commerce of archaeological resources, the excavation, sale, removal purchase, transportation, exchange, or receipt of which was "in violation of any provision, rule, regulation, ordinance, or permit in effect under State or local law."[92] Given the numerous references in ARPA to federal and

87. *Quarrell*, 310 F.3d at 672. The court observed that unlike the "long tradition of gun ownership" recognized in *Staples*, there was no similar tradition associated with excavation of archaeological resources - without permission - in private or public land and that such conduct was not "viewed as an innocent act." *Id.*

88. *Id.* at 673. As the court explained:

> Requiring a defendant to know the object he is removing is an archaeological resources protects against convicting the casual visitor, like a Boy Scout, who picks up an object unaware that it is a prehistoric artifact. It is unclear, however, how requiring a defendant to know the status of the land he is excavating will further Congress' desire to avoid punishing the casual visitor or prevent punishing otherwise innocent conduct.

Id.

89. *Id.* at 674; *see United States v. Speir*, 564 F.2d 934, 938 (10th Cir. 1977) (requirement under 18 U.S.C. § 641 that the stolen property be property of the United States "furnishes the jurisdictional basis for the federal offense").

90. *Id.* at 675 (internal quotation omitted; emphasis in original).

91. 16 U.S.C. § 470ee(a), (b).

92. 16 U.S.C. § 470ee(c).

Indian lands at least two questions are presented under section 470ee(c) – first, despite the references in this section to state and local law, is the Act applicable only to federal and/or Indian lands? Second, assuming the Act extends beyond federal and/or Indian lands, do the violations of state or local laws have to pertain to laws which concern archaeological sites or objects, or can they be laws of general application such as those prohibiting theft and trespass? These questions were squarely confronted by the case to which we now turn.

In *United States v. Gerber*,[93] defendant, a well-known collector of Indian artifacts, was convicted of transporting in interstate commerce artifacts he had stolen from a burial mound located on privately owned land in violation of Indiana's conversion and trespass laws.[94] On appeal, he argued that the preamble to the Act and its legislative history demonstrated that the omission to federal and Indian lands in section 470ee(c) was inadvertent; therefore, that section needed to be construed as being limited to sites and objects on Indian and federal lands.[95] In the alternative, defendant maintained that to the extent violations of state or local law triggered section 470ee(c)'s applicability, those state or local laws needed to be "explicitly concerned with the protection of *archaeological* sites or objects."[96]

The United States Court of Appeals for the Seventh Circuit rejected both contentions. With respect to the former, the court determined that the reference in section 470ee(c) to interstate commerce "would be superfluous if the subsection were limited to artifacts taken from federal or Indian lands, since either source would establish federal jurisdiction with no need to require proof that the artifacts were transported in interstate commerce."[97] As to the latter, the court agreed that the "Act [wa]s limited to cases in which the violation of state law [wa]s related to the protection of archaeological sites or objects" but also found that "to be deemed related to the protection of archaeological resources a state or local

93. 999 F.2d 1112 (7th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994).
94. *Id.* at 1113.
95. *Id.* at 1115.
96. *Id.* at 1116 (emphasis in original).
97. *Id.* at 1115. As to the argument presented in an amicus brief by a number of amateur archaeologist associations that such an interpretation would infringe on their ability to enhance their archaeological knowledge by excavating private lands, the court tersely noted that there "[wa]s no right to go upon another person's land, without his permission, to look for valuable objects buried in the land and take them if [one] find[s] them." *Id.* at 1115-16.

law . . . [need not] be *limited* to that protection."[98] *Gerber*'s ruling is significant in that it judicially confirmed that "ARPA can be used to protect archaeological resources located on private land if they [w]ere obtained illegally and moved across state lines."[99]

D. The Sentencing Guidelines, Restitution and ARPA

The calculation of loss and/or damage to an archaeological resource is an important element of an ARPA prosecution in the event of a conviction both for purposes of the offense level and for determining the amount of restitution. In the past decade, there have been only two reported cases which have addressed the amount of "loss" for sentencing purposes under the Sentencing Guidelines.[100] These two cases, which were decided prior to the promulgation of a guideline specifically addressing cultural resource crimes, are briefly discussed below.

In *United States v. Shumway*,[101] defendant was convicted of three ARPA violations, three counts of damaging government property, and one firearms violation.[102] Two of the ARPA and damage to government property offenses related to his unauthor-

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98. *Gerber*, 999 F.2d at 1116 (emphasis in original). As the court explained in *Gerber*:

> A law that forbade the theft of Indian artifacts 'and any other objects having historical or artistic value' could not reasonably be thought a law unrelated to the protection of such artifacts merely because it had broader objectives. That is essentially what Indiana's laws forbidding trespass and conversion have: objectives that include but are not exhausted in the protection of Indian artifacts and other antiquities. A law that comprehensively protects the owner of land from unauthorized incursions, spoliations, and theft could well be thought to give all the protection to buried antiquities that they need, making the passage of a law specially protecting buried antiquities redundant – and the passage of new laws is never costless and rarely easy.

Id.

99. McManamon, *supra* note 6, at 267 (footnote omitted); Jurist, *supra* note 10, at 120 (noting that "Section 470ee(c) is particularly important because it extends ARPA protection to archaeological resources that are not derived from public or Indian lands once these objects are obtained in violation of any state or local law and are transported in interstate or foreign commerce.") (footnote omitted).

100. Generally speaking, under the Sentencing Guidelines, when property is taken or destroyed, the measure of the "loss" – a critical component for sentencing purposes – is ordinarily measured by the fair market value of the property. U.S. SENTENCING GUIDELINES MANUAL §§ 2B1.1, cmt. n.2, 2B1.3(b)(1). When the property is damaged, the loss is "the cost of repairs, not to exceed the loss had the property been destroyed [i.e., the fair market value]." *Id.* The Guidelines go on to state, however, that "[w]here the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way." U.S. SENTENCING GUIDELINES MANUAL § 2B1.1, cmt. n.2.

101. 112 F.3d 1413 (10th Cir. 1997).

102. *Id.* at 1417. The charges upon which defendant was convicted stemmed from two separate indictments. *Id.*

ized excavation of two Anasazi archaeological sites.[103] In the first, defendant excavated the burial site of an Anasazi infant, removing the burial blanket and leaving the infant's remains on the ground.[104] A damage assessment of the site undertaken subsequently revealed that only the skull of the infant remained "on top of the dirt pile."[105] At the second site, defendant found and removed a sleeping mat and sandals.[106]

Although the sum of the cost of restoration and repair and the fair market value of the artifacts taken totaled $9,122, the district court added an amount for "archaeological value" to arrive at a loss of over $120,000.[107] The court justified its inclusion of archaeological value to this measure of loss under note 2 of section 2B1.1 of the Sentencing Guidelines, which states that "[w]here the market value is difficult to ascertain or inadequate to measure the harm to the victim, the court may measure the loss in some other way."[108] Defendant argued on appeal that this was error and that under the Guidelines, the district court should have relied exclusively on the fair market value of the artifacts taken and the cost of repair to the sites to calculate the loss.[109] The United States Court of Appeals for the Tenth Circuit disagreed.

The court of appeals determined that, given the nature of the "detestable conduct" defendant engaged in,[110] the cost of repair and fair market value "calculation was grossly insufficient to quantify the devastating and irremediable cultural, scientific and spiritual damage [defendant] caused to the American people in general and to the Native American community in particular."[111] In light of the inadequacy of those traditional yardsticks to measure loss, and the recognition in the Sentencing Guidelines themselves that there may be instances where ordinary measures may be inade-

103. *Id.* The Anasazi were "a prehistoric culture living in the Four Corners area of Utah, Arizona, Colorado, and New Mexico during the Formative Period from 300 A.D. to 1300 A.D." *Id.* at 1417 n.2.

104. *Id.* at 1417-18.

105. *Id.*

106. *Shumway*, 112 F.3d at 1418.

107. *Id.* at 1424-25. This had the effect of increasing defendant's offense level by five levels. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(E) (increasing offense level by four if the loss exceed $5,000 but is less that $10,000) *with* § 2B1(b)(1)(j) (increasing offense level by nine if the loss exceeds $120,000 but is less than $200,000).

108. *Shumway*, 112 F. 3d at 1424 (internal quotation omitted).

109. *Id.* at 1425.

110. *Id.* at 1423 n.4. The court noted that "[g]rave robbing, especially grave robbing the sacred objects of Native Americans, [wa]s undoubtedly detestable conduct worthy of severe castigation[.]" *Id.*

111. *Id.* at 1423.

quate, the Tenth Circuit ruled that in including archaeological value as defined in the regulations, the district court had used a "reasonable and objective measure specifically formulated to calculate damages under the statute [defendant] was convicted of violating to calculate loss for purposes of sentencing."[112]

The rationale employed in *Shumway* was not always followed by other courts when calculating loss in an ARPA related prosecution. In *United States v. Hunter*,[113] defendant was convicted of two ARPA violations and one count of damaging government property.[114] The ARPA violations related to prehistoric archaeological resources from two sites and the cost of repair and restoration of the damaged sites was estimated at $9,661.47.[115] In addition, the court added $2,000 to the loss to take into account "aesthetic diminishment at the sites," since "[e]ven when fully restored, they c[ould] never be put back to their pre-excavation condition."[116] The total loss for sentencing purposes thus totaled $11,661.47.[117]

Relying on *Shumway*, the government maintained at sentencing that in addition to the estimated cost of repair and restoration, the loss needed to include the archaeological value of the sites, which it estimated at $34,238.18.[118] The court rejected the government's argument. First, it noted that *Shumway* did not establish a firm rule that archaeological value was always an element of loss. Rather, *Shumway* merely recognized that if the ordinary measures to calculate loss were inadequate, an additional amount reflecting archaeological value may be used.[119] In the case involving defendant Hunter, however, the ordinary measures for loss were sufficient.[120] This was because, unlike *Shumway*, the disparity in the loss calculation in Hunter's case when applying and not applying archaeological value was only four and one-half times

112. *Id.* at 1425-26. The court also ruled that skeletal remains cannot constitute a "vulnerable victim" for purposes of enhancing a defendant's sentence under Section 3A1.1(b) of the Sentencing Guidelines. *Id.* at 1424.

113. 48 F. Supp. 2d. 1283 (D. Utah 1998).

114. *Id.* at 1284-85. The charges to which defendant pled and for which he was convicted stemmed from two separate indictments and the cases were consolidated for sentencing purposes. *Id.*

115. *Id.* at 1285, 1287. No market value was assigned by the government to the partial spear point and five to fifteen arrowheads which defendant removed from the sites. *Id.* at 1287.

116. *Id.* at 1288.

117. *Id.*

118. *Hunter*, 48 F. Supp. at 1288. Added to the cost of repair and restoration, this figure increased the loss to $43,895.65. *Id.*

119. *Id.* at 1290.

120. *Id.* at 1288.

greater.[121] Furthermore, the defendant had not removed items of great archaeological importance or disturbed human remains.[122]

But even if an adjustment for archaeological value was warranted, the court determined that the estimate proffered by the government was unreliable because it differed substantially from the estimate in a prior report which the court had used in sentencing a co-defendant.[123] In addition, the amount estimated by the government overstated, in the court's view, the value of defendant's unlawful activities.[124]

In *Shumway* and *Hunter*, the courts utilized the general property sentencing guideline to determine loss. In November 2002, however, the Sentencing Commission promulgated a new sentencing guideline tailored specifically to the protection of cultural heritage resources.[125] This new guideline found at section 2B1.5 "takes into account the transcendent value of these irreplaceable resources, and punishes in a proportionate way the particular offense characteristics associated with the range of cultural resource

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121. *Id.* at 1290. When using archaeological value as an element, the amount of loss in *Hunter* increased from $9,961 to $43,895; in *Shumway*, the amount increased from $9,122 to $137,200. *Id.*

122. *Id.* (footnote omitted).

123. *Hunter*, 48 F. Supp. at 1290-92.

124. *Id.* The court reasoned that "all [defendant] uncovered during his excavation were some arrowheads" which the government had not lost. *Id.* at 1293. As to what was lost, the court observed:

> [W]hat the United States has lost is the information concerning the location of the arrowheads to one another, their exact location at the sites when uncovered, and whether they were recovered with or nearby other items of archaeological import.
>
> Unfortunately, the United States' estimates regarding archaeological value do not put a dollar value on this context. Instead, the offered archaeological value presents a fiction. Starting with the assumption that the site was never excavated, it goes on to estimate what it would have cost the United States to prepare a study of the site, to excavate the site, to remove, analyze, and store any artifacts, and to prepare scientific reports. . . . The problem with this fiction is that it does not reflect reality. The reality is that the site was excavated, albeit unlawfully, and all that was uncovered were some arrowheads.
>
> Armed with the knowledge that a dig at the site would only yield arrowheads, a more accurate calculation of archaeological value would be based on the estimated costs to the United States to recover these artifacts.

Id.

125. A new guideline "that would provide (1) greater guidance to judges in evaluating the harm caused by cultural heritage resource crimes and (2) increased punishment for the offenses" had been under consideration by the United States Sentencing Commission for two years. *See* Press Release – Sentencing Commission Increases Penalties for Crimes Against Cultural Heritage (Mar. 25, 2002) *available at* http://www.ussc.gov/PRESS/rel0302.htm.

crimes."[126] Specifically, in addition to provisions automatically increasing the base offense level if the offending conduct involved an archaeological resource in the national park system or one containing human remains,[127] the application note to the guideline provides that archaeological value, commercial value and cost of restoration and repair shall be included in assessing the value of an archaeological resource.[128]

In connection with the promulgation of this guideline which, as noted above, became effective in November 2002, the Chair of the Sentencing Commission wrote to the Senate Judiciary Committee recommending the elimination of the 24 month ceiling for first time felony offenses under ARPA, as well as the raising of the statutory maximum from 5 to 10 years.[129] To date, no legislation incorporating these recommendations has been enacted by Congress.

A third case decided after the promulgation of the sentencing guideline specifically tailored to the protection of cultural resources but addressing restitution is *United States v. Quarrell*.[130] As noted earlier, the defendants in *Quarrell* were convicted of vio-

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126. Statement of Christopher Kearney, Deputy Assistant Secretary for Policy, Management and Budget, Department of the Interior, Before the Subcommittee on National Parks, Historic Preservation, and Recreation of the Senate Committee on Energy and Natural Resources Concerning S.2598, Enhance Protection of our Cultural Resources Act of 2002, Jul. 23, 2002, *available at* http://www.doi.gov/ocl/2002/s2598.htm.

127. As more generally explained by the Sentencing Commission Staff:

> The guideline . . . has several specific offense characteristics that provide increases (1) if the offense involves a place or resource that Congress has designated for special protection; (2) if the offense that involves any number of specified resources, including human remains and other resources that have been designated by Congress for special treatment and heightened protection under federal law; (3) if the offense was committed for pecuniary gain or otherwise involved a commercial purpose; (4) if the offense involves a pattern of misconduct; and (5) if a dangerous weapon, including a firearm, was brandished or its use threatened.

Amendments to the Federal Sentencing Guidelines (Effective November 1, 2002 unless modified or rejected by Congress) – Highlights of Key Points, at 2.

128. U.S. SENTENCING GUIDELINES MANUAL § 2B1.5, cmt. n.2. Specifically, application note states:

> (A) General Rule – For purposes of subsection (b)(1), the value of the cultural resource shall include, as applicable to the particular resource involved, the following:
>
> (i) The archaeological value. (Archaeological value shall be included in the case of any cultural heritage resource that is an archaeological resource.)
>
> (ii) The commercial value.
>
> (iii) The cost of restoration and repair.

§ 2B1.5, cmt. n.2.

129. *See* Letter from Judge Diana E. Murphy, Chair to The Honorable Patrick J. Leahy (Chair) and the Honorable Orrin G. Hatch (Ranking Member), Senate Committee on the Judiciary (Apr. 3, 2002) *available at* http://www.ussc.gov/culheritage/leahy_hatch.htm.

130. 310 F.3d at 664.

lating § 470ee(a) and conspiring to violate ARPA pursuant to 18 U.S.C. § 371 for vandalizing an archaeological site in the Gila National Forest in southern New Mexico.[131] On appeal, defendants argued that the restitution order entered against them by the district court under the Mandatory Victim Restitution Act (MVRA)[132] was illegal because ARPA exclusively permitted restitution only in the context of civil penalties.[133] Additionally, they maintained MVRA did not apply because there was no "identifiable victim," and an ARPA violation did not constitute an offense under Title 18 – a predicate to the applicability of MVRA.[134] Defendants further argued that even if MVRA applied, the court had erred in finding that restitution was mandatory as opposed to discretionary.[135] Lastly, defendants maintained that the amount of restitution improperly took into account damages for the archaeological value of the site.[136] The United States Court of Appeals for the Tenth Circuit rejected all of the arguments concerning the lack of applicability of MVRA but agreed with defendants' contention that the amount of restitution should not have included the archaeological value of the site.

First, and relying on ARPA's legislative history, the court found that the Act's failure to provide explicitly for restitution under the criminal penalty provisions did not preclude a court from imposing restitution under the MVRA's more general provisions.[137] In a similar vein, neither did the Act's provision of restitution under the civil penalty provisions preclude the imposition of restitution

131. *Id.* at 668.

132. The Mandatory Victim Restitution Act, codified at 18 U.S.C. § 3663A, provides in pertinent part that "[n]otwithstanding any other provisions of law, when sentencing a defendant convicted of an offense described in subsection (c), the court *shall* order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense." *Id.* at 3663A(a)(1) (emphasis added). Subsection (c) applies "in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense (A) that is . . . (ii) an offense against property under this title . . . and (B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss." *Id.* at 3663A(c)(1).

133. *Quarrell*, 310 F.3d at 676.

134. *Id.* at 677; *see supra* note 13.

135. *Quarrell*, 310 F.3d at 677-78.

136. *Id.* at 678-79.

137. *Id.* at 677. The court cited language in the House report to the extent that in enacting the criminal penalty provisions, "[t]he committee [wa]s aware that these penalties overlap[ped] with more general statutes and regulations, and there [wa]s no intent to preclude action under those general provisions relating to the protection of federal property under appropriate circumstances." *Id.* (quoting H.R. No. 96-311, at 1714, U.S. Code Cong. & Admin. News 1979, p. 1709 (1979)).

in a criminal case.[138] With respect to MVRA, the court determined that the government could be a victim under that act and while it covered offenses arising under Title 18, and ARPA violations did not fall under that title, defendants also had been charged with conspiracy under Title 18, a qualifying offense.[139] Finally, as to the argument that conspiracy was not "an offense against property" and therefore restitution was discretionary and not mandatory,[140] the court ruled that in defendants' case, "[t]he underlying predicate acts and purposes that constituted the conspiracy were an offense against property."[141] And since MVRA called for mandatory restitution if the offense against property was committed by fraud and deceit,[142] the court reasoned that "[e]ven though the statute d[id] not explicitly refer to conspiracy, the MVRA applie[d] to conspiracies when, as with fraud or deceit, their underlying purpose was an offense against property."[143]

With respect to the amount of restitution, which included the archaeological value of the damage done at the site, the court ruled that while the inclusion of such amount for determining the *offense level* may be appropriate under the teaching of *Shumway* to take into account adequately the damage inflicted by a defendant, the *amount* of restitution under the guidelines was a separate inquiry.[144] An order of restitution, the court held, needed to be based on the actual loss suffered and that would not include archaeological value since that would "require[] the court to speculate on the cost of a hypothetical dig that may never have occurred."[145] In the case of *Quarrell*, therefore, the actual loss was the cost of restoration and repair.[146]

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138. *Id.*

139. *Id.*; *see* United States v. Minnemann, 143 F.3d 274, 284 (7th Cir. 1998) (finding restitution appropriate under Victim Witness Protection Act which had same requirement where defendant convicted of tax offenses under Title 26 and conspiracy under Title 18).

140. Under the Victim Witness Protection Act, which MVRA supplements, a court has discretion to order restitution "when sentencing a defendant convicted of an offense under this title . . . other than an offense described in section 3663A(c)." 18 U.S.C. § 3663(a)(1)(A).

141. *Quarrell*, 310 F.3d at 678.

142. 18 U.S.C. § 3663A(c)(1)(A)(ii) provides for mandatory restitution with respect to "an offense against property under this title . . . including any offense committed by fraud or deceit."

143. *Quarrell*, 310 F.3d at 678.

144. *Id.* at 679-80.

145. *Id.* at 680.

146. *Id.*

E. Synthesis of Reported Criminal Cases

As reflected in the analysis of the cases discussed above, ARPA has withstood a number of challenges to the application of its criminal penalty provisions. Courts have ruled that its terms are not impermissibly vague or overbroad[147] and that it can be used to protect archaeological resources on private land if obtained illegally and transferred across state lines.[148] Mandatory restitution is also recognized in an ARPA related prosecution under the Mandatory Victim Restitution Act, provided that the defendant also stands convicted of a qualified offense under Title 18.[149] Further, and along these lines, a new Sentencing Guideline specifically tailored to the protection of cultural heritage resources, which include archaeological resources under the Act, now governs sentencing for ARPA related offenses.[150]

The only area where the Act may be said to have encountered a setback of sorts, from the perspective of law enforcement, has been in the interpretation of ARPA's mens rea requirement. There, as discussed above, while the Tenth Circuit held in *Quarrell* that it is not necessary for the government to prove that a defendant knew or had reason to know that he was engaged in the prohibited conduct on public or Indian land because that is a jurisdictional element,[151] under the Ninth Circuit's ruling in *Lynch*, the government must prove that a defendant knew or had reason to know that he was dealing with an archaeological resource.[152]

A few points bear consideration with respect to *Lynch's* ruling. First, the court in *Lynch* was concerned with "the casual visitor who happens to find some exposed artifact[.]"[153] A defendant who

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147. *See Austin*, 902 F.2d at 744-45.

148. *See Gerber*, 999 F.2d at 1115-16. *But see* Ades, *supra* note 3, at 628-29 (arguing that "[t]o ensure that ARPA remains an effective archaeological resource protection mechanism, Congress should clarify the language of the interstate trafficking provision" and, short of that, "[r]evision of the uniform regulations to incorporate the term private lands could remedy any discrepancy as to ARPA's applicability to private lands.").

149. *See Quarrell*, 310 F.3d at 676-78.

150. *See* U.S. SENTENCING GUIDELINES MANUAL § B1.5. This new guideline incorporates the value methodology which had been espoused by the court in *Shumway*.

151. *See Quarrell*, 310 F.3d at 669-73. In dicta, the court in *Quarrell* also observed that the interstate or foreign commerce requirement of section 470ee(c) was a jurisdictional element. *Id.* at 670.

152. *See Lynch*, 233 F.3d at 1145-46.

153. *Lynch*, 233 F.3d at 1142 (internal quotation omitted); *id.* at 1144 ("comments [of bill's sponsor and others] acknowledge the possibility that boy scouts and other 'casual visitors' might innocently and inadvertently remove an artifact from the public domain."); *id.* at 1145 ("With respect to . . . ARPA . . . the legislative history suggests that Congress

alone or with others is apprehended with tools in federal or Indian lands performing an unauthorized excavation in the middle of the day or night presents a different question on the issue of circumstantial evidence of knowledge. Furthermore, in those districts directly impacted by *Lynch's* ruling,[154] statements by the defendant on this issue obviously will take on an added significance. Finally, and to the extent practicable, a search warrant may also assist in obtaining records from a defendant which may relate to his knowledge of the age of the archaeological resources.[155]

IV. EMERGING ADMINISTRATIVE LAW RELATING TO THE CIVIL PENALTY PROVISIONS

Initially, the lack of access to a formal administrative proceeding mechanism involving administrative law judges hampered enforcement of ARPA's civil penalty provisions outside of the Department of the Interior.[156] That deficiency, however, was amelio-

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was concerned about the risk of penalizing arch[a]ecologically naive visitors to public lands.").

154. *Lynch*, of course, only binds the district courts in the Ninth Circuit. *See* Stinson v. United States, 102 F. Supp.2d 920, 922 (M.D. Tenn. 2000) (district court not bound by decision of other circuits); United States v. Krasner, 841 F. Supp. 649, 656 n.5 (M.D. Pa. 1983) (absent guidance from circuit in which district court sits, district court "free to reject holdings . . . of sister circuits"); Noto v. United States, 598 F. Supp. 440, 442 n.6 (D.N.J. 1984) ("A district judge is not bound by the appellate decisions outside its own circuit."); *cf.* United States v. Brown, 74 F. Supp. 2d 648 (N.D.W.Va.1998) ("district court is bound by the precedent set by its Circuit Court of Appeals, until such precedent is overruled by the appellate court or the United States Supreme Court"). *See also* Hart v. Massanari, 266 F.3d 1155, 1171 (9th Cir. 2001) ("Circuit law . . . binds all courts within a particular circuit, including the court of appeals itself.").

155. As observed by three well-regarded commentators:

> Situations may arise in which a search warrant is needed during investigation of a case before it goes to trial. ARPA cases add a few new considerations to the standard concern in drafting and serving a search warrant. Since artifacts may have been transferred to coconspirators or since recovered artifacts may need restoration work before they can be released and such work may take considerable time, there may be grounds for obtaining a warrant several weeks after a violation is discovered. The general rule is that search warrants will not be issued where the information is stale, which usually means more than few days old. The unique circumstances surrounding ARPA violations may allow for the acceptance of a longer period after the alleged violation, as compared with other types of criminal cases, such as those involving drugs.

Hutt, Jones & McAllister, *supra* note 14, at 75.

156. Hutt, *supra* note 11 (recognizing "[t]he lack of an agency [administrative law judge] impeded active civil enforcement for agencies outside the Department of the Interior"). In 1987, the Department promulgated additional regulations consistent with the uniform regulations and the purposes of the Act. Hutt, Jones & McAllister, *supra* note 14, at 32. These regulations are found at 43 C.F.R. §§ 7.31-7.38 and include procedures for civil penalty hearings which parallel and supplement those contained in the uniform regulations. *See* 43 C.F.R. § 7.37.

rated by memoranda of understanding entered into in 1988 and 1990 by the Department of the Interior with the Department of Agriculture and the Tennessee Valley Authority.[157] Notably, to date, there is no district or circuit court opinion squarely addressing the application of ARPA's civil penalty provisions.[158]

The few administrative decisions which have concerned the application of the civil penalty provisions are discussed below. They all have involved rulings at the administrative law judge level and have addressed a number of issues, including the level of scienter necessary to establish a violation, the application of principles of vicarious liability, the determination of archaeological and commercial value and consideration of factors in mitigation of a penalty, and time limitations affecting the initiation of civil penalty proceedings.[159] The headings which follow identify some of the key issues addressed by these opinions.

A. Scienter and Vicarious Liability

In *Eel River Sawmills, Inc. v. United States*,[160] petitioners, a contractor and its subcontractor and president, sought administrative review of assessment notices under ARPA totaling $43,500 for damages to an archaeological site at Six Rivers National Forest in California.[161] The damage occurred as a result of unauthorized excavation and construction of water holes and access roads on the archaeological site.[162]

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157. Hutt, *supra* note 11 (noting that the problem created by lack of access to an administrative law judge was "rectified with the issuance of Memoranda of Agreement with Interior executed by the Forest Service and the Tennessee Valley Authority.") (footnote omitted).

158. As previously noted, final administrative decisions resulting in the imposition of a civil penalty may be appealed to a United States District Court. *See* 16 U.S.C. § 470ff(b)(1);18 C.F.R. § 296.16(h)(3), (i); 32 C.F.R. § 229.16(h)(3), (i); 36 C.F.R. § 296.16(h)(3), (i) ; 43 C.F.R. § 7.16(h)(3), (i).

159. Under the regulations, rulings by administrative law judges can be appealed to the Director of the Office of Hearings and Appeals at the Department of the Interior who shall then "appoint an ad hoc appeals board to hear and decide the appeal." 43 C.F.R. § 7.37(f)(2).

160. Eel River Sawmills v. United States, Docket Nos. 90-1 & 90-2 (Aug. 10, 1992). A copy of this decision is on file with the author. *See* Hutt, *supra* note 11 at n.6 (stating that "[t]he first civil matter to utilize the ARPA civil process . . . was *Eel River*").

161. *Id.* at 1-3.

162. *Id.* at 3. On the issue of authorization, the judge found that the alleged "common practice [of] loggers to develop water supplies without the Forest Service's permission c[ould not] override the plain terms of [Eel River's] contracts requiring the Forest Service's prior approval." *Id.* at 7.

At the administrative hearing, petitioners raised three contentions. First, they argued that the civil penalty provisions did not apply because they were not aware that archaeological resources were present on the site they excavated.[163] Next, they maintained that the amount of the penalty assessed should have been lower because they had not willfully damaged the archaeological site and they had also performed work to restore it.[164] Finally, the contractor Eel River argued that it could not be held vicariously liable for the acts of Western Pacific, its subcontractor.[165]

The administrative law judge rejected the argument that petitioners' ignorance of the fact that archaeological resources were present at the site where the excavation of the water holes and the access roads was undertaken constituted a defense to the imposition of civil penalties.[166] The judge ruled that "ARPA and its implementing regulations d[id] not require proof of knowledge or intent to assess civil penalties against a person who violate[d] the Act by excavating or damaging archaeological resources."[167] In reaching this conclusion, the judge relied on the plain language of the statute and the implementing regulations,[168] and also on the

163. *Id.* at 4-5.

164. *Id.* at 7-11.

165. *Eel River,* at 11.

166. *Id.* at 5.

167. *Id.* In support of their argument, petitioners relied in part on Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990). In *Attakai,* members of the Navajo Tribe sought to enjoin the Department of the Interior and the Bureau of Indian Affairs from constructing livestock watering facilities and fences on portions of the Hopi Indian Reservation as part of a range management and restoration program. *Id.* at 1398. They maintained that the construction activities interfered with the exercise of their religion in violation of the First Amendment and the American Indian Religious Freedom Act, and also that said conduct destroyed objects of religious and archaeological value in violation of several statutes, including ARPA. *Id.* The district court granted the motion for a preliminary injunction insofar as the National Historic Preservation Act was concerned and dismissed all other counts, including the one alleging violations of ARPA. *Id.* at 1413. In rejecting the ARPA claim, the district court noted that the archaeologist had testified that there had been no excavation of archaeological resources and that the Act was not applicable to the projects at issue. *Id.* at 1410. Contrasting other statutes which plaintiffs alleged had been violated, the court pointed out that "the Act [wa]s clearly intended to apply specifically to purposeful excavation and removal of archaeological resources, not excavations which may, or in fact inadvertently do, uncover such resources." *Id.*

Petitioners in *Eel River* relied on this last observation by the court *Attakai* for the proposition that ARPA did not apply to "excavations which inadvertently uncover [archaeological] resources." *Eel River,* at 5. The administrative law judge found, however, that this comment was dicta and "contrary to the plain meaning of ARPA and its legislative history." *Id.*; *see Fein v. Peltier,* 949 F. Supp. 374, 380 (D. V.I. 1996) (agreeing that "purposeful excavation" comment in *Attakai* was "mere dicta").

168. *Eel River,* at 6. The judge referred to 16 U.S.C. § 470ff(i), which provides in pertinent part that "[a]ny person who violates any prohibition contained in an applicable regula-

fact that, as reflected by the criminal penalty provisions, "Congress could have added an element of knowledge or intent to the civil penalty provisions as well, but declined to do so."[169]

As to the amount of the penalty assessed, the judge first determined that he had no power to declare the regulations, under which that figure was calculated, invalid.[170] With respect to the amount itself, the judge found that a total of $43,500 for archaeological value and cost of restoration and repair, which was approximately one fourth of the maximum permissible penalty, sufficiently factored in respondents' lack of willfulness and restoration work.[171]

Finally, with respect to Eel River's contention that it could not be held vicariously liable for the acts of its subcontractor Western Pacific, the administrative judge determined that while Eel River might be liable for breach of contract on account of Western Pacific's activities, it was not liable for the statutory penalties imposed on its subcontractor.[172] The judge reasoned that such a conclusion was consistent with the rule that penalty statutes should be strictly construed and also with the provisions of ARPA, which nowhere indicated that contractors could be held liable for the acts of their subcontractors.[173]

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tion . . . may be assessed a civil penalty," and 36 C.F.R. § 296.4, which tracked the language of 16 U.S.C. § 470ee(a). *Id.*

169. *Id.* The judge recognized that ARPA's legislative history indicated that civil penalties were not to "be used to harass citizens in their normal use of the public lands or to impose heavy penalties on persons who inadvertently violate the regulations in a minor way." *Id.* (quoting H.R. No. 96-311, June 29, 1979, reprinted in 1979 U.S. Code Cong. & Admin. News 1709). *See also* Hutt, *supra* note 11, ("In the case of technical violations of a permit, agencies must proceed cautiously in seeking sanctions. During the passage of ARPA, Congress expressed concern that penalties not be used to harass citizens in their normal use of public land.") (footnote omitted). In the case involving petitioners, however, the excavations caused major damage and did not represent a normal use of the public lands. *Eel River*, at 6.

170. *Eel River*, at 7.

171. *Id.* at 11. The judge found that including certain costs as components of both archaeological value and cost of restoration and repair amounted to double counting and improperly assumed "that two separate examinations (excavations) of the site would be conducted to first determine the archaeological value and then the cost of restoration and repair." *Id.* at 9. The amount which the judge ultimately affirmed no longer included these "double" costs. *Id.* at 11.

172. *Id.* at 11.

173. *Eel River*, at 11. After appealing the judge's ruling to the Interior Board of Land Appeals, petitioners subsequently settled the case. Hutt, *supra* note 11, at n.6.

B. *Archaeological Value, Commercial Value, and Mitigation of Penalty*

The next significant administrative law case addressing ARPA's civil penalty provisions was *Arizona Silica Sand Co. v. Acting Navajo Area Director, Bureau of Indian Affairs.*[174] In that case petitioner, Arizona Silicon Sand Company (ASSC) had obtained a permit in 1966 from the Navajo Nation to mine sand at the Navajo Indian Reservation near Houck, Arizona.[175] In 1981, ASSC was told by the tribe that it should desist with any further mining efforts if it discovered archaeological materials in the course of its operations in the area over which it was granted the permit.[176] A decade later, in 1991, an ASSC employee inadvertently discovered an archaeological site.[177] ASSC, however, did not secure or monitor the area and two of its employees, using heavy equipment, moved dirt onto the site.[178] The Navajo Nation Historic Preservation Office also issued a cease and desist order in 1993 which in part directed ASSC to erect a fence around the site, but no fence was put in place until 1994.[179] ASSC subsequently received a notice of violation for damage to the site[180] and later a notice of assessment with a penalty of $70,672.[181]

ASSC requested an administrative hearing and challenged the assessed penalty on a number of grounds.[182] The administrative law judge rejected all of ASSC's contentions but deferred ruling on the validity of the assessed penalty pending further development of the administrative record on the question of whether mitigating factors warranted a lower penalty.[183] Specifically, the judge found that ASSC was liable under the doctrine of respondeat superior for the conduct of its employees[184] and that the notices of violation and assessment had been issued by the proper parties under the regu-

174. Arizona Silica Sand Co. v. Acting Navajo Area Director, Bureau of Indian Affairs, IBIA 94-186-A (October 21, 1996). A copy of this decision is on file with the author.

175. *Id.* at 1, 6.

176. *Id.* at 1, 12.

177. *Id.* at 2, 12.

178. *Id.* at 2, 6, 12.

179. *Arizona Silica Sand Co.*, at 6-7.

180. The first notice was issued on April 18, 1994; a second notice was issued on July 7, 1994, and included a proposed penalty in the amount of $70,672. *Id.* at 7.

181. *Id.* at 8.

182. *Id.* at 8.

183. *Id.* at 20.

184. *Id.* at 12-13, 20. The judge applied Arizona law, which the parties stipulated governed, and distinguished *Eel River* on the grounds that it involved a subcontractor and not an employee. *Id.* at 12-13.

lations.[185] She further determined that there was nothing inappropriate about the use of commercial value, as opposed to archaeological value, in a case where there was no intentional damage to the site,[186] no artifacts had been removed, and there was no indication of "commercial profiteering."[187] The judge also found that while the methodology employed by the government's archaeologist to establish the commercial value of the artifacts at the site was not the most "optimum," it complied with applicable standards.[188]

Following the judge's ruling, ASSC submitted additional information to the federal land manager explaining why mitigation of the penalty was appropriate.[189] ASSC maintained that a reduction was warranted because it had not acted willfully or removed archaeological resources from the site, remained willing to help restore the site, and would suffer a financial hardship if it had to pay $70,672.[190] The land manager found that none of these miti-

185. *Id.* at 13-15, 20. In the case involving ASSC, the tribe had a contract with the Department of the Interior's Bureau of Indian Affairs to perform archaeological functions. *Id.* at 13.

186. Relying in part on *Eel River*, the judge ruled that "ARPA [wa]s a law that [could] be viewed as a strict liability statute." *Id.* at 16.

187. *Id.* The record established that commercial value had been selected over archaeological value because it was a lesser amount. *Id.* at 15. The judge also noted that "[w]hile it appear[ed] that experts ha[d] their own personal views about when use of one over the other [wa]s appropriate, and it further appear[ed] that circumstances may be a strong determinative factor, there [wa]s no one flat rule which direct[ed] or restrict[ed] use of one or the other values in particular contexts." *Id.* at 16. And as to including the cost of "complete curation" as opposed to the cost for a "sampling" as a component of archaeological value, the judge found that it did not amount to double counting (with values incorporated in the independent cost of restoration and repair calculation). *Id.* at 17-18.

188. *Id.* at 18-19. In assigning the commercial value for the artifacts at the site, the archaeologist in *Arizona Silica Sand Co.* selected the comparable prices for such artifacts in "a gallery in a tourist area." *Id.* at 18. The judge explained his concern for this procedure by noting:

> I do not find selecting a single artifact price from a single source rather than establishing a price or price range from an array of sources to be an optimum procedure under the statute not only because it could lead possibly to unusually high figures or subjective selectivity in a process that is already recognized by experts as subjective but also because lack of such data or information effectively nullifies the hearing judge's ability to exercise fully those powers conferred to reduce, augment or otherwise adjust assessed penalties as contemplated under 43 C.F.R. Section 7.15(g)(3).

Id. at 18-19.

189. Arizona Silica Sand Co. v. Acting Navajo Area Director, Bureau of Indian Affairs (Arizona Silica Sand Co. II), IBIA 94-186-A (April 2, 1997). A copy of this decision is on file with the author.

190. *Id.* at 2; *see* 43 C.F.R. § 7.16(b) (setting forth factor to consider in mitigation).

gating factors justified a reduction of the penalty and the administrative judge agreed.[191]

First, as to petitioner's willfulness, the judge found that the land manager had acted reasonably in not reducing the amount of the penalty because ASSC committed more than one violation and also failed to erect a fence to protect the site for many months in contravention of a cease and desist order.[192] This same conduct essentially justified the land manager's decision not to reduce the penalty even though petitioner had agreed to provide assistance to restore and protect the site, and never removed any resources from the site.[193] Lastly, as to the amount of financial hardship associated with the penalty, the judge again agreed with the land manager that petitioner had failed to provide any meaningful financial data in support of his request for mitigation.[194] While petitioner maintained that in three of the past five fiscal years it had not made a profit from its operations, the judge concurred with the land manager's determination that such an earnings history shed no light on whether petitioner would not be able to obtain a loan or have to sell essential assets to pay the penalty.[195]

C. Timing Limitations

The last significant administrative decision addressing the application of ARPA's civil penalty provisions is *Harelson v. Bureau of Land Mgmt.*[196] In *Harelson*, petitioner, "a long-time collector of Native American artifacts" discovered a site in 1980 in federal land in Nevada managed by the Department of the Interior's Bureau of Land Management ("BLM") which subsequently came to be known as Elephant Mountain Cave.[197] At the time of the initial discovery, the cave was "a small slit on the side of the mountain" but after five years of excavation, it "was a cavern 70 feet wide and 12 feet high."[198] During that time, petitioner and his then wife

191. *Arizona Silica Sand Co. II*, at 2. At the time of this determination, a new administrative judge had been assigned to the case. *Id.*

192. *Id.* at 3.

193. *Id.* at 3-4.

194. *Id.* at 4.

195. *Id.* at 4-5.

196. Jack Lee Harelson v. Bureau of Land Mgmt., Docket No. 97-1 (December 6, 2002). A copy of this decision is on file with the author.

197. *Id.* at 7 (internal quotation omitted).

198. *Harleson*, at 12 (internal quotation omitted).

removed countless artifacts and took them home.[199] Among the items they took from the cave were two large baskets, each containing the body of a child (a boy and a girl).[200] After removing the bodies and assorted artifacts from the baskets, they placed the bodies in plastic garbage bags, buried them in petitioner's back yard, and kept the baskets and the artifacts for his collection.[201]

In 1996, petitioner was convicted in Oregon state court of first degree theft and tampering with physical evidence in connection with his looting of Elephant Mountain Cave.[202] That same year, BLM served petitioner with notices of violation and assessment containing a civil penalty in the amount of $2,525,316 and petitioner thereafter sought administrative review of that penalty on several grounds.[203]

The administrative law judge rejected petitioner's contentions and affirmed the decision of the land manager.[204] First, relying on prior rulings from the Interior Board of Land Appeals, the judge found that 28 U.S.C. § 2415, which governs the time for commencing tort and contract actions by the United States, did not affect when administrative proceedings seeking the civil penalties could be brought under ARPA.[205] Next, the judge found that the government had established by a preponderance of the evidence that pe-

199. *Harleson,* at 12. Illustrative of the archaeological significance of the cave, a BLM archaeologist noted that a pair of sandals petitioner pilfered "ha[d] been radiocarbon dated to 10,000 years ago, making them the oldest footwear ever found in Nevada and among the oldest in the world." Eric A. Powell, *Cave Looter Allegedly Solicits Murder*, ARCHAEOLOGY, Jan. 27, 2003, *available at* http://www.archaeology.org/magazine.php?page=online/features/nevadacave/index.

200. *Id.*

201. *Id.*

202. Oregon v. Harelson, 938 P.2d 763, 764 (Or. Ct. App. 1997). The Oregon Court of Appeals affirmed those convictions but reversed petitioner's convictions for abuse of a corpse on statute of limitations grounds. *Id.* Petitioner's wife was granted immunity and assisted the government in its prosecution of petitioner. *Id.* at 765.

203. *Harelson,* at 1.

204. *Id.* at 16. The administrative law judge found:

> Petitioner failed to obtain the permit required by 43 C.F.R. Section 7.4(a), and over the course of several years from 1980 to 1985, excavated a cave that was originally a small slit in the side of the mountain to a cavern that was 70 feet wide and 12 feet high. Petitioner's unauthorized and illegal excavations destroyed the archaeological context of the many artifacts taken by Petitioner, and destroyed almost all of the scientific value of the site. Under the circumstances presented by this case, I conclude that the penalty amount of $2,525,316 is not excessive.

Id.

205. *Id.* at 10. The judge found that the Board had ruled on numerous occasions "'that statutes establishing time limits for the commencement of judicial actions for damages on behalf of the United States do not limit administrative proceedings within the Department of Interior conducted to determine liability and fix the amount the Government claims to be due.'" *Id.* at 10 (quoting *Marathon Oil Co.*, 149 IBLA 287, 290 (1999)).

titioner had violated ARPA by not obtaining a permit prior to excavate Elephant Mountain Cave and removing archaeological resources from the cave.[206] Lastly, the judge determined that the amount of the civil penalty assessed by the land manager, which consisted of $1,758,767 in archaeological value and $766,549 in restoration and repair was justifiable,[207] and he rejected petitioner's contention that the amount of the penalty warranted a reduction because there had been no loss and he would suffer a financial hardship if ordered to pay this amount.[208]

D. Synthesis of Administrative Law Decisions

As demonstrated by the discussion above, to date, there is no district or circuit court opinion squarely addressing the application of any of ARPA's civil penalty provisions.[209] The three opinions in this area, all emanating from administrative law judges, shed some light on how, at least at that level, some of the civil penalty provisions have been interpreted.

In particular, judges have ruled that knowledge or intent is irrelevant to establish a violation under ARPA's civil penalty provi-

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206. *Harelson*, at 10. In reaching this conclusion, the court followed the teaching of *Eel River* that ARPA provides a strict liability or absolute standard by which civil penalties may, but need not be assessed, and that the excavations involving Elephant Mountain Cave, as those in Eel River, caused major damage and did not constitute a normal use of public lands. *Id.* at 11.

207. *Id.* at 13. The land manager arrived at the penalty amount by obtaining estimates from three reputable archaeological contracting firms, taking the average of the amounts calculated by the firms for archaeological value and cost of restoration and repair, and then adding those two amounts. *Id.* at 4-6. The land manager had also asked the firms to calculate the commercial value of the archaeological resources damaged and destroyed by petitioner's conduct but concluded, applying the regulations, that archaeological value as opposed to commercial value was the appropriate measure because "[t]he loss to the American people from the destruction of the [c]ave, and the insult to Native Americans from the desecration of the burials in the [ca]ve, far outweigh[ed] the commercial value of the materials in the illegal action." *Id.* at 7. Petitioner did not challenge the method employed by the land manager to arrive at the civil penalty and the judge found the process "rational and consistent with the governing regulations." *Id.* at 13.

208. As to the alleged absence of monetary loss, the judge ruled that "[t]he primary purpose of the civil penalty [wa]s its utility as an enforcement tool, not as a mechanism to 'make whole' those victims who may have suffered monetary damages." *Id.* at 15. With respect to financial hardship, the judge acknowledged that while the amount of the penalty was not insignificant, other than a bare assertion by petitioner that he lacked financial resources, there was no specific information concerning his financial status to support a finding of hardship. *Id.*

209. As previously noted, final administrative decisions resulting in the imposition of a civil penalty may be appealed to a United States District Court. *See* 16 U.S.C. § 470ff(b)(1); 18 C.F.R. § 296.16(h)(3), (i); 32 C.F.R. § 229.16(h)(3), (i); 36 C.F.R. § 296.16(h)(3), (i) ; 43 C.F.R. § 7.16(h)(3), (i).

sions.[210] They also have held that an employer is not liable for statutory penalties if its independent contractor violates ARPA,[211] but is liable for such penalties on account of the conduct of its employees.[212] The rulings involving vicarious liability naturally are the product of the particular facts involved in those cases; future cases may lead to different results.[213]

Another issue addressed by one of the administrative decisions involved application of the statute limitations. In *Harelson*, the judge ruled that 28 U.S.C. § 2415, which governs the time within which the United States may bring actions for money damages in contract or tort, did not impose any time limitation on when *administrative proceedings* may be initiated in connection with ARPA's civil penalty provisions.[214] While the interpretation of section 2415 to apply to the commencement of a judicial action for damages and not an administrative action for the purpose of determining liability finds ample support in decisions from the Interior Board of Land Appeals,[215] it is important to note that 28 U.S.C. § 2462, which was not discussed by the court and which governs actions, suits, or proceedings for the enforcement of civil penalties may be found to provide a time limitation for the com-

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210. *Harelson*, at 11; *Arizona Silica Sand Co.*, at 16; *Eel River*, at 6. *See also Lynch*, 233 F.3d at 1145 (contrasting statutory "knowing" requirement applicable to criminal but not civil violations). A violator's lack of willfulness, however, may be considered as a mitigating factor in determining whether the amount of the penalty should be decreased. *See* footnote 38, *supra*.

211. *Eel River*, at 11. Citing McCormick v. Nobel Drilling Corp., 608 F.2d 169, 174-75 (5th Cir. 1979) as support, and given the particular facts in that case, the judge in *Eel River* applied the well-established principle that an employer generally is not liable for the acts of its independent contractor in absolving Eel River of liability. *Eel River*, at 11. The decision in *McCormick* relied on the Restatement (Second) of Torts and past opinions of the Fifth Circuit applying Mississippi law. Additionally, the judge noted that penalty statutes "should be strictly construed," and that ARPA did not provide for the imposition of liability on a contractor for the acts of its subcontractor. *Id.*

212. *Arizona Silica Sand Co.*, at 12. Applying Arizona law and the rule that an employer is liable for the acts of an employee, provided they fall within the course and scope of his employment, the judge in *Arizona Silica Sand Co.* ruled that ASSC was liable for the acts of its employee when he dumped dirt on the archaeological site. *Id.*

213. The legal issues surrounding liability presented by the acts of an independent contractor or an employee are varied. In the context of the imposition of civil penalties under ARPA, the administrative law judges in *Eel River* and *Arizona Silica Sand Co.* applied state and federal law. *See* footnotes 211 & 212, *supra*. While the legal principles governing the liability of an employer for the conduct of its employee or an independent contractor are well developed, to the extent state laws vary, different results may be reached administratively when examining the issue of the vicarious liability. The application of federal law also may present its own variations.

214. *Harelson*, at 10.

215. *See, e.g., Marathon Oil Co.*, 149 IBLA 287, 290 (1999); *Cenex, Inc.*, 145 IBLA 254, 257 (1998); *W.A. Moncrief*, 144 IBLA 13, 15-16 (1998).

mencement of administrative proceedings under ARPA.[216] Whether, and to what extent the timing limitations of section 2415 may be interposed as a bar against the government if it seeks to collect the amount of a penalty by instituting a civil action in district court has not yet been decided.[217]

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216. 28 U.S.C. § 2462 states:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462. Courts have interpreted the limitations period in Section 2462 to apply to the initiation of administrative proceedings whose goal is the imposition of civil penalties. *See, e.g.*, Arch Mineral Corp. v. Babbitt, 104 F.3d 660 (4th Cir. 1997) (reviewing administrative action by Office of Surface Mining Reclamation and Enforcement (OSM) linking corporation to company which owed delinquent abandoned mine land penalties and fees to OSM); 3M Company v. Browner, 17 F.3d 1453 (D.C. Cir. 1994) (involving review of Environmental Protection Agency's assessment of civil penalties for violations of Toxic Substances Control Act). But the term "penalty" is not defined under Section 2462 and judicially it has been interpreted to mean "a form of punishment imposed by the government for unlawful or proscribed conduct, *which goes beyond the damage caused to the harmed parties* by the defendant's action." Johnson v. S.E.C., 87 F.3d 484, 491 (D.C. Cir. 1996) (emphasis added; footnote omitted); *accord* Proffitt v. F.D.I.C., 200 F.3d 855, 860 (D.C. Cir. 2000); United States v. Telluride Co., 146 F.3d 1241, 1246 (10th Cir. 1998). Thus, if the damages recoverable under ARPA's civil penalty provisions are deemed to be remedial in nature, then an argument could be made that the limitations period of Section 2462 does not control. *Cf.* United States v. Perry, 431 F.2d 1020, 1025 (9th Cir. 1970) (action to recover sums paid in violation of Anti-Kickback Act not one for enforcement of civil penalty under Section 2462 since sanctions "designed to make the United States whole by recovering the extra costs that occurred when kickbacks were paid"); SEC v. Lorin, 869 F. Supp. 1117, 1122-23 (S.D.N.Y. 1994) (disgorgement not a "fine, penalty, or forfeiture" within meaning of Section 2462 since sanction "strictly remedial"). *See also* Meeker v. Lehigh Valley R.R. Co., 236 U.S. 412, 423 (1915) (discussing meaning of penalty under Section 2462's predecessor).

217. The limitations period which governs the time within which a civil action must be brought in district court under 16 U.S.C. § 470ff(b)(2) to collect a penalty is beyond the scope of this article. This much, however, appears to be clear. First, the four year limitations period provided for in 28 U.S.C. § 1658(a) could not apply since it governs "any civil action arising under an Act of Congress enacted" after December 1, 1990. ARPA was enacted in 1979. Second, and in the context of 28 U.S.C. § 2415, an initial question presented is whether a civil action under section 470ff(b)(2) to recover a penalty, the "validity and amount" is not subject to review, is more akin to a suit to collect a judgment, and therefore, not subject to Section 2415's time limitations. *Cf.* United States v. Southern Fabricating Co., 764 F.2d 780, 782 (11th Cir. 1985) (consent judgment); United States v. Hannon, 728 F.2d 142, 145 (2d Cir. 1984) (default judgment). Finally, assuming such an action is not analogous to a suit on a judgment and that § 2415 provides the controlling period of limitations within which an action must be brought, different periods will apply depending on whether the action is characterized as sounding in contract or in tort, and whether it is being brought on behalf of "a recognized tribe, band or group of American Indians[.]" *Id.*

V. CONCLUSION

Cultural resource crimes continue to take place with frequency on public and Indian lands throughout the nation.[218] The trend in recent years has been away from the hiker who picks up an artifact to the "professional looter"[219] who methodically researches the location of promising archaeological sites and then illegally sells the resources he discovers supplying networks of dealers and collectors.[220] In combating this complex problem, the vigorous enforcement of ARPA's tested criminal and civil penalty provisions, in conjunction with other federal laws, may serve as a deterrent against those intent on stealing our Native American and national treasures.

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218. *See, e.g.*, U.S. Attorney's Office, District of Nevada Press Release, *Three Remaining Artifacts Looters Sentenced,* December 16, 2003 (reporting on sentencing of defendants who were part of a group which "stole over 11,000 artifacts from 13 archeological sites in Nevada and California between late 1997 and December 2001"), *available at* http://www.usdoj.gov/usao/nv/home/pressrelease/january2004/peterson011604.htm. *See also* BLM Press Release, *$20,000 Reward Offered Following Destruction of Archaeological Resources*, Oct. 15, 2003 (announcing reward for information leading to arrest and conviction of those involved in looting BA Cave Rockshelter, a site registered on the National Register of Historic Places, located in Worland, Wyoming) *available at* http://www.wy.blm.gov/ newsreleases/2003/oct/10-15wfo-reward.htm. *See also* Ades, *supra* note 3, at 628 ("Archaeological sites are constantly targets of unauthorized removal and excavation, despite efforts by government and tribal agencies."); Cultural Resource Management in Contemporary Society, at 259 (2000) ("Although the Four Corners area of the U.S. Southwest has long been a focus of activity and concern, the looting of archaeological sites in the United States occurs throughout the nation.").

219. Testimony of John Fryar, U.S. Sentencing Commission Public Hearing (Feb. 26, 2002), at 2 (professional looters "will dig at night using the cover of darkness to mask their activities. They usually park vehicles some distance from the site they are working and then hike in and carry their tools such as probes, shovels, trowels, flashlights, and screens."). *See also* Lesli S. Potter & Bruce Zagaris, *Toward a Common U.S. – Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 TRANSNAT'L. LAW. 627, 635 (1992) (noting how "professional looters employ portable generators, prefabricated huts, earthmoving and excavation equipment, power tools and metal detectors" to obtain resources from sites).

220. *See* Testimony of John Fryar, *supra* note 217, at 1-2 (discussing "dramatic drop in the instances of looting caused by 'mom and pop' out for a Sunday picnic or damage caused by boy scout troop out for a day hike" but increase by "hard core looters"); Statement of Christopher Kearney, *supra* note 126 (discussing that "recent trend is the theft and damage of cultural resources by 'professional looters,' hard-core looters who sell the resources for monetary gain and often have criminal histories, usually drug-related or violence-related").